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IN THE
Supreme Court of the United States

October Term, 1975

No. 75-1144

In Re Northwest Homes of Chehalis, Inc.,
Debtor,

Thomas Hansen, Receiver of Northwest
Homes of Chehalis, Inc.,
Petitioner,
v.
Weyerhaeuser Company,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The decision which Petitioner is asking this Court to review has been reported as In the Matter of Northwest Homes of Chehalis, Inc., 526 F.2d 505 (9th Cir. 1975).

ARGUMENT

I.
This Case Raises No Question of Federal Law Which Has Not Already Been Settled By This Court

A. In Light of Spielman-Fond, Inc. v. Hanson's, Inc., 417 U.S. 901 (1974), a Reexamination of McKay v. McInnes, 279 U.S. 820 (1929), Is Not Necessary.

Petitioner's argument on the merits is that an attachment of real estate, although nonpossessory and therefore not disturbing the owner's use or possession, is nevertheless a "taking" of an important property right because it prevents the owner, during the pendency of the main action against him, from selling or mortgaging the attached land for the same amount of money which he could get if there were no attachment lien; hence the land can be attached only after the owner has been afforded an opportunity for an adversary hearing on whether an attachment is justified.

The last time this view was urged here, this Court summarily affirmed a holding that the "taking" resulting from an attachment of land does not rise to the magnitude of an unconstitutional deprivation. McKay v. McInnes, 279 U.S. 820 (1929), aff'g McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928). Invoking that portion of this Court's Rule 19(1)(b) which indicates that certiorari may be granted "where a court of appeals . . . has decided an important question of federal law which has not been, but

should be, settled by this Court . . .", Petitioner urges that McKay v. McInnes be reexamined in light of this Court's decisions in Sniadach v. Family Finance Corporation, 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), which, while not invalidating nonpossessory pre-judgment creditors' remedies like attachment liens, are said to express a view of Due Process which is hostile to them.

The relevant part of Rule 19(1)(b) requires not only that Petitioner raise an important federal question; it also requires that the question be one which has not been settled by this Court. The federal question raised by Petitioner was settled by this Court a short time ago in Spielman-Fond, Inc. v. Hanson's, Inc., 417 U.S. 901 (May 28, 1974). While that case upheld a mechanic's lien rather than an attachment lien, the two types of liens are indistinguishable for Due Process purposes in that both can be created without a prior adversary hearing, and both produce the same "deprivation," namely an inability to sell or mortgage the land encumbered by them for the same amount of money which could be obtained in their absence. It follows that Spielman-Fond settled the question which Petitioner is seeking to raise, and that the Court of Appeals was right in viewing it as controlling precedent.

Recognizing the relevance of Spielman-Fond, Petitioner implies that this case differs from it in one particular which might justify a distinction: here, the attaching creditor had no

pre-existing legal interest in the attached land, whereas a mechanic's lien claimant "arguably . . . has a nexus with the property liened." Petition, p. 10. The point has no merit. A mechanic's lien claimant has usually no pre-existing legal interest in the land against which he has filed his lien, and the mechanic's lien law upheld in Spielman-Fond neither assumes nor requires that he have such an interest. The "nexus" referred to by Petitioner consists solely of the fact that the mechanic's lien claimant has performed some kind of work (usually construction work) on the land subject to the lien, and while this has a bearing on whether he is entitled to file that kind of lien, it is irrelevant to the question whether a mechanic's lien, if and when duly filed, results in a "taking" of that land for Due Process purposes. This is undoubtedly the reason why neither the lower court's opinion in Spielman-Fond nor this Court's affirmance of it give any indication that this "nexus" had any influence on the result.

B. The Adequacy of the Post-Attachment Remedy Afforded to a Landowner by Washington Law is Irrelevant. In any Event, the Remedy Is Adequate.

In the last two paragraphs of its opinion in this case, the Court of Appeals implied that the post-attachment remedy afforded to the owner of attached Washington real estate by RCW 7.12.270 is as adequate as that which was available to the debtor in Mitchell v. W. T. Grant Company, 416 U.S. 600 (1974). Petitioner, disagreeing with this view,

apparently wishes this Court to review the adequacy of that remedy on the ground that it, too, is an important federal question which has not been, but should be, settled by this Court.

We submit that it is not such a question because, for one thing, the post-attachment remedy afforded by RCW 7.12.270 was not the basis of the Court of Appeals' decision. A fair reading of its opinion shows that the two last paragraphs are just dicta. Second, if the Court of Appeals was right in holding that the attachment in this case was not such a "taking" as calls the Due Process clause into operation, the adequacy of that post-attachment remedy is irrelevant. In a case like Mitchell, where there was a true taking because the debtor was physically dispossessed, the immediate availability of an adequate post-seizure remedy may make the difference between Due Process and a denial of Due Process. See Mitchell v. W. T. Grant Company, 416 U.S. 600, 625 (1974), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975). But where, as here, there is no taking of that degree of severity which calls the Due Process clause into operation, the adequacy of any post-taking remedy or, for that matter, of any notice of taking is immaterial since neither is constitutionally required in the first place.

However, a brief reply to Petitioner's criticisms of the Washington procedure may still be appropriate. Petitioner's first and chief objection to it is that it does not require a

notice of attachment to the property owner. Petitioner argues that in the absence of such a notice, he cannot avail himself of the post-attachment remedy afforded by RCW 7.12.270 because he does not know that his real estate has been attached. One answer to this criticism is that it could also be leveled at mechanic's lien laws; typically they do not require that the owner of the property subject to the lien be notified of its filing, yet their constitutionality can no longer be doubted. Spielman-Fond, Inc. v. Hanson's, Inc., 417 U.S. 901 (1974). Furthermore, the Washington procedure gives the property owner at least constructive notice of the attachment in that it requires a recording of the writ of attachment, together with a legal description of the attached property, in the land records of the county in which it is located. RCW 7.12.130(1). Having done that, the sheriff must "return" the writ of attachment, i.e., file it in the court file on the lawsuit to which the attachment is ancillary, together with a certificate of his proceedings. RCW 7.12.300. This comes very close to giving actual notice because under Washington procedure there always is a lawsuit against the owner of the attached property, and any defense attorney worth his salt will check the court file on it at periodic intervals in order to become aware of just such ex parte orders as writs of attachment, among other things.

Petitioner's second criticism of RCW 7.12.270 is that it puts the burden of proving the non-existence of grounds for an attachment on the debtor instead of requiring the attaching creditor to prove

the existence of grounds justifying the attachment.

RCW 7.12.270 allows the debtor to move to discharge the writ of attachment "on the ground that the same was improperly or irregularly issued." His only burden is to inform the Court, by affidavit or otherwise, of the specific impropriety or irregularity which he is attacking. RCW 7.12.280. When the debtor has done that, the attaching creditor must prove the propriety and regularity of the attachment. If he does not, the writ will be discharged. RCW 7.12.290; Bender v. Rinker, 21 Wash. 633, 59 Pac. 503 (1899). The debtor never has to prove or disprove anything.

The post-seizure remedy which was one of the "saving characteristics" of the Louisiana procedure under attack in Mitchell

> ". . .expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued."

North Georgia Finishing, v. Di-Chem, Inc., 419 U.S. 601, 607 (1975). We submit that the Court of Appeals was amply justified in concluding that the Washington procedure under attack in this case has the same "saving characteristic."

II.
The Court of Appeals' Decision Below Is Not In Conflict With That of Any Other Court of Appeals

Petitioner is also urging that this Court grant certiorari in order to resolve a conflict between the decision below and Gunter v. Merchants Warren National Bank, 360 F.Supp. 1085 (D. Me. 1973), Clement v. Four North State Street Corp., 360 F.Supp. 933 (D. N.H. 1973), Bay State Harness Horse Racing and Breeding Association v. PPG Industries, 365 F.Supp. 1299 (D. Mass. 1973) and Terranova v. Avco Financial Services, 396 F.Supp. 1402 (D. Vt. 1975).

It is true enough that the four decisions just cited are in conflict with that of the Court of Appeals below, but what Rule 19(1)(b) requires is a conflict between two courts of appeals, or a court of appeals and this Court. A conflict between a court of appeals decision and that of one or more federal district courts has never, without more, been regarded as an adequate reason for certiorari. A leading text on practice before this Court, Stern & Gressman, Supreme Court Practice (Fourth Ed. 1969), Sec. 4.8, states flatly:

> "The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit."

There are indications that the conflict relied upon by Petitioner may soon resolve itself without action by this Court. It will be noticed that three of the four district court decisions in question were rendered in 1973, i.e., before this Court's rulings in Mitchell and Spielman-Fond. The first and most important of these district court decisions, which became the chief authority relied upon by the other three, is Judge Gignoux' opinion in Gunter v. Merchants Warren National Bank, 360 F.Supp. 1085 (D. Me. 1973). But upon learning of Mitchell and Spielman-Fond, Judge Gignoux abandoned the views which he had expressed in Gunter, explaining:

> "Mitchell and Spielman-Fond require the conclusion that the real estate attachment liens in the present case were not obtained in violation of the Due Process clause and therefore were not, as the Bankruptcy Judge held, subject to avoidance by the alleged bankrupt."

The Oronoka, 393 F. Supp. 1311, 1317 (D. Me., March 17, 1975).

Spielman-Fond is still not a very well-known decision. This explains why Terranova v. Avco Financial Services, 396 F.Supp. 1402 (D. Vt. 1975) still follows Gunter; neither Spielman-Fond nor Judge Gignoux' more recent opinion in The Oronoka were called to the court's attention. But as these cases become better known, the other district courts will probably follow Judge Gignoux' lead again

and the conflict relied upon by Petitioner will resolve itself without this Court's intervention.

CONCLUSION

Respondent respectfully submits that the Petition for Certiorari in this case gives no sufficient reasons why this Court should review the Court of Appeals' decision. Respondent suggests that the Petition be denied.

Respectfully submitted,

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